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**1995 Wis Eth Bd 3**  
**DISQUALIFICATION; EMPLOYMENT CONFLICTING WITH OFFICIAL  
DUTIES; IMPROPER USE OF OFFICE**

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As a general proposition, a legislator's simultaneous membership on the governing board of a governmental entity is not an obstacle to the legislator's discussions, deliberations, and votes upon matters before the Legislature that affect the entity.

A legislator should not simultaneously receive compensation for services as a member of a governmental agency's governing board and participate as a legislator in actions affecting a bill that would increase or sustain or preserve the legislator's eligibility to receive compensation from the entity. OEB 95-3 (June 21, 1995)

Facts

[1] This opinion is based upon these understandings:

- a. You are a member of the Legislature and a state public official.
- b. You are also a member of the governing board of a governmental entity, and you receive compensation for your service on the board.
- c. A bill currently before the Legislature would make you ineligible for service on the governing board.

Questions

[2] The Ethics Board understands your question to be:

Consistent with Wisconsin's code of ethics for state public officials, may you simultaneously [1] hold a salaried position on the governing board and [2] participate in discussions, deliberations, and votes of the Legislature on the bill affecting the board?

Discussion

[3] The provision of the Ethics Code that is pertinent to your question is §19.45(2), *Wisconsin Statutes*.<sup>1</sup> Reduced to its elements, this statute provides:

No state public official  
May use his or her public position  
To obtain financial gain or anything of substantial value  
For the official's private benefit  
Or for an organization with which the official is associated.

[4] You are a state public official by virtue of being a member of the Legislature.<sup>2</sup> Your participation in discussions, deliberations, and votes of the Legislature on a bill affecting the governing board would be a use of office. The remaining question is whether your participation in discussions, deliberations, and votes on the bill would obtain for you financial gain or anything of substantial value.

[5] As an initial matter, there is no provision in the laws administered by the Ethics Board that would restrict your voting on matters generally affecting the entity. Although §19.45(2) prohibits an official from using office to obtain anything of substantial value for “an organization with which he or she is associated,” the statute does not apply to using one’s office for the benefit of a unit or creature of government.<sup>3</sup> Thus, we are unaware of any restriction on your participation in discussions, deliberations, or votes on proposals to affect the jurisdiction, powers, or operations of the entity.

[6] In this case, the bill not only affects the entity as a governmental body but also affects your membership on the governing board and your salary as long as you continue as a member of the Legislature.

[7] In situations where a state official is asked to make a legislative or quasi-legislative decision that affects the official’s personal financial interests, the Ethics Board has consistently applied the following test. In

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<sup>1</sup> Although §19.46, *Wisconsin Statutes*, addresses conflicts between officials’ public responsibilities and private interests, the statute, by its own terms provides “this section does not prohibit a state public official from taking . . . action with respect to any proposal to modify state law or the state administrative code.”

<sup>2</sup> See §19.42(13)(c), *Wisconsin Statutes*.

<sup>3</sup> Section 19.42(11) defines “organization” as “any corporation, partnership, proprietorship, firm, enterprise, franchise, association, trust or other legal entity *other than* an individual or *body politic*.” (Emphasis added).

accord with §19.45(2), an official may participate in a legislative decision, even if it financially affects the official, if:

- a. The action affects the whole class of similarly situated persons;
- b. The official's presence in the class is insignificant when compared to the number of members of the affected class; and
- c. The action's effect on the official are neither significantly greater nor less than upon other members of the class.<sup>4</sup>

[8] This test recognizes that an official may participate in and vote on matters that affect the official or the official's business only incidentally and that affect an official to no greater or lesser extent than other citizens involved in similar pursuits.

[9] Application of this test to the present matter does not permit a conclusion that supports your participation in legislative action on a bill in which you are financially interested. The bill's effect on you is direct and not incidental. Enactment of the bill could affect your income. In these circumstances, your vote, in effect to retain your salaried seat on the governing board, could undermine citizens' confidence in government, the underlying goal of the Ethics Code. §19.41, *Wisconsin Statutes*. The better course is that you not simultaneously serve as a salaried member of the governing board and participate, in your capacity as a legislator, in actions affecting the bill that would increase or sustain compensation of the board's members or would preserve your eligibility to receive compensation from the board.

[10] Our advice is consonant with common law principles. The established rule of the common law is that a member of a legislative body is disqualified to vote on propositions in which he or she has a direct pecuniary interest.<sup>5</sup> As the Attorney General has said:

A pecuniary interest sufficient to disqualify exists . . . where it is one which is personal or private to the member, not such an interest as he has in common with all other citizens or owners of property, nor such as arises out of the power of the [government] to tax his property in a lawful manner.<sup>6</sup>

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<sup>4</sup> See, e.g., 11 Op. Eth. Bd. 9 (1989); 8 Op. Eth. Bd. 38 (1985), 21 (1984); 5 Op. Eth. Bd. 90 (1982), 65, 59 (1981); 4 Op. Eth. Bd. 104 (1981).

<sup>5</sup> *The Board of Supervisors of Oconto County v. Hall, imp.*, 47 Wis. 208 (1879).

<sup>6</sup> 36 Op. Att'y Gen. 45 (1947). See also 67 C.J.S. Officers §204.

[11] This standard is incorporated in manuals governing legislative procedure. For example, Mason's Manual of Legislative Procedure, §522 (1989), provides that "One may not vote for oneself for a remunerative office ... or vote a salary to [oneself] as [an] office[r]." <sup>7</sup>

[12] In order to cure the conflict of interest that presents itself, the Ethics Board recommends that you demonstrate that your interest in the bill is not a personal, financial interest either by forgoing the salary for serving as a member of the governing board or stepping down as a member. A public officer owes an undivided duty of loyalty to the public whom he or she serves. Public policy favors a state public official's exercise of his or her official duties and an official should avoid placing himself or herself in a position in which the official must refrain from exercising official responsibilities because a conflict of interest might arise.<sup>8</sup> If you decide to forgo a salary, we recommend that you do so for the new term beginning in the very near future. Alternatively, you may acknowledge that your personal financial interests may be affected by the Legislature's disposition of the bill and refrain from discussions, deliberations, and votes of the Legislature on the bill.

#### Advice

[13] We reiterate the long-standing and consistent advice conveyed for more than five years: As a general proposition, a legislator's simultaneous membership on the governing board of a governmental entity is not an obstacle to the legislator's discussions, deliberations, and votes upon matters before the Legislature that affect the entity. It is only the current bill's effect on a personal and substantial financial interest specific to you that merits additional consideration. \_

[14] The Board advises that, in order to order to cure the conflict between your legislative responsibilities to act on the bill, which would affect your eligibility for appointment to a the governing board of a governmental entity

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<sup>7</sup> *Id.* See also *Stevens ex rel. Kuberski v. Haussermann*, 113 N.J.L. 162, 172 A. 738 (1934) (a legislative official may not vote to accept his or her own resignation in order to be able to accept an appointive office); *Armstrong v. Whitehead*, 67 N.J.L. 405, 51 A.472 (1902) (an official may not vote for his or her own appointment to fill a vacancy).

<sup>8</sup> 14 Op. Eth. Bd. 41 (1993); 14 Op. Eth. Bd. 25 (1992); 14 Op. Eth. Bd. 21 (1992); 8 Op. Eth. Bd. 33 (1985). As a general matter, occasional and infrequent conflicts may be dealt with by the official's abstaining from participation in official matters, as required to avoid violating the Ethics Code. However, continuing and frequent conflicts might best be dealt with by divesting either the private interest or the public responsibilities.

and your personal financial interest in receiving a salary from the board, you should not simultaneously receive compensation for services as a member of a governmental agency's governing board and participate, in your capacity as a legislator, in actions affecting the bill that would increase or sustain compensation of the board's members or would preserve your eligibility to receive compensation from the board. Consistent with this advice, you may either (i) forgo the salary for your service on the governing board or (ii) neither hold over to a new term nor accept reappointment to the board. Alternatively, acknowledging the conflict between your legislative responsibilities and your personal financial interest, you may withdraw from participation as a legislator in discussions, deliberations, and votes of the Legislature affecting your eligibility to receive compensation from the board.<sup>9</sup>

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<sup>9</sup> Statutes administered by the Ethics Board are not an obstacle to your introduction of or action on amendments or your participation in other aspects of the bill not having the effect of increasing or sustaining compensation of the governing board's members or preserving your eligibility to receive compensation from the entity.